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**To:** [Goldmann, Elizabeth](#)  
**Subject:** Fw: Summary of Santa Cruz/L.A. River Briefing from House T&I staff  
**Date:** Tuesday, October 25, 2016 5:16:09 PM  
**Attachments:** [Briefing on Santa Cruz-L.A. T&I Maj 10-16-08.doc](#)

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## Document Body

Below is the summary from last weeks staff briefing between EPA and majority staff. We wanted to give you a heads up since your names came up in the meeting; it's also important to see how HQ staff and House staff see some of these issues. Brent and I have been trying for the last week to get the summary and they (HQ) certainly did an thorough job of taking the notes at the meeting. Please let us know if we should followup on any issues with folks back in OCIR. Have a great weekend, Jim

Just in case you get a call:

**Brent/Jim heads-up to Wayne, Alexis and David only because Ben Webster wrote down their names and sometimes e-mails or calls directly.**

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Denis Borum/DC/USEPA/US

10/24/2008 01:25 PM

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Subject

Summary of Santa Cruz/L.A. River Briefing

All,

Sorry for the delay; I've been out a couple of days since the meeting last Thursday. Dave/Kevin, if I have mis-stated anything here please let me know and I'll send an amended version. **Brent/Jim heads-up to Wayne, Alexis and David only because Ben Webster wrote down their names and sometimes e-mails or calls directly.**

Denis

*(See attached file: Briefing on Santa Cruz-L.A.\_T&I Maj\_10-16-08.doc)*

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## **Summary of Briefing on Santa Cruz/L.A. Jurisdictional Determinations**

Date: October 16, 2008

House T&I Water Resources and Environment Majority Staff: Ryan Seiger, Ben Webster, Ted Ilston, Michael Brain

EPA: Dave Evans, Kevin Minoli, Anthony Moore

The primary focus was to discuss: 1) EPA's perspective on how traditional navigable waters (TNWs) fall within the broader jurisdictional determinations (JDs) process, and specifically regarding the Santa Cruz/L.A. cases; 2) the status and on-going nature of the two specific cases; and 3) the discussion content at the September 4, 2008 meeting with T&I WRE minority staff.

Dave Evans explained the integral nature of TNW to JDs. Regarding the two subject cases, he said OW wanted to ensure that all appropriate procedures and resources were used in the determination. It was also conveyed that Ben Grumbles had previously designated various lakes as TNWs. Ryan Seiger asked whether EPA considers category A3 waters as "isolated" and whether A3 has been used to make JDs. EPA staff indicated that A3 remains legally valid for JDs but that it has not been used exclusively for JDs (at least since *SWANCC*). Ryan asked about use of the "Scalia test" (*Rapanos*), the "Kennedy test," and decision sequencing in a JD approach. Kevin Minoli described the approach, with the Scalia test as a minimum (if it passes, the determination is made) and proceeding on to the Kennedy test when necessary. EPA staff also indicated the conflict between historical use of A3 based solely on migratory bird rule. That is, this has now been effectively taken away.

Ben Webster asked about an Army Corps response that highlights Appendix D as a rationale. He said that it is very narrative and less suited to a JD. Ben wanted to know what decision criteria we are using, especially given disagreement of opinions. Dave indicated that where there was evidence of navigable uses, there is likely no difference of opinion. Where such evidence is lacking, the Corps is hesitant to expand (The court said in the L.A. case that the "canoe test" was not enough). Ben wanted to know if EPA will have something in writing, especially for the sake of consistency. Dave indicated affirmatively and emphasized that this was a primary reason for Ben Grumbles to assert the lead in these cases; that is, a goal for the facts in these two cases to be the basis of principles for consistency. Ben Webster asked whether there were principles being used in these fact-based endeavors (really, a rhetorical comment).

Ryan asked if the Corps is interacting with EPA on the Corps' initial reviews for TNW determinations (Ben stated he thought that EPA only knew because of leaked information). Dave indicated that, no, there was active coordination. Dave further stated that there is no standardized coordination procedure, rather the working relationship varies from one EPA Region/Corps District to another. Ryan pressed further on the impression that EPA was "in the dark" (vis-à-vis EPA stepping in). EPA again

emphasized that Ben Grumbles believed the process was copasetic but that the cases are seminal.

Ben Webster asked why EPA did not create written guidance, given its absence (and an implied presumption of a non-TNW status of water bodies). EPA staff questioned the initial presumption and Ben replied that the L.A. River was preliminarily considered a non-TNW. Ryan stated the case law statute language varies greatly and, therefore, confuses the issues and is dangerous to use. Kevin indicated the reliance on the Scalia standard. Ryan suggested that *Rapanos* has made EPA timid, and both Dave and Kevin defended EPA's recent approach. Ryan pressed the issue, wanting clear evidence that EPA is being proactive. Staff offered to provide Ryan examples of unilateral EPA decisions where joint decisions (following elevation, due to disagreements) had failed. Dave did acknowledge concerns about a conservative mindset on risk calculations for JDs in the post-*Rapanos* atmosphere.

Ben Webster next turned to more specific Santa Cruz and L.A. River questions, asking first about principal EPA staff involved. Dave mentioned Ben Grumbles and EPA Region IX staff, including Wayne Nastri, Alexis Strauss and David Smith. Ben then wanted to know about process and time line for both cases. He complained about the lack of a formalized process for the TNW decisions and speculated that Ben Grumbles wants a different outcome. Dave affirmed that the Corps District Commander's initial decision was his own and that interactions continue, in addition to Alexis and David testifying at an L.A. Council meeting the next week.

Ryan asked about consideration of the main stem of the L.A. River and how one "traces," and to what extent, to the headwaters. Dave said that it varies and that with L.A., EPA is not considering stretches of the River until after the waters return to the U.S. (i.e., after the Mexico portion). When asked about a time line, Dave said EPA was hoping for before the end of the year. Ben questioned tributary JDs also pending – that is, backlog issues, domino issues. He wanted to know whether there would be discrete segment JDs and would this be final regarding other tributaries. Dave indicated his presumption that this would be an entire river determination, although re-visiting is always a possibility (with the L.A. case, this is an initial determination). Ben Webster urged taking as much time as necessary. Ryan asked if any party has demanded the determination be made before the end of this Administration. Dave indicated that Ben Grumbles is not locked into anything.

Ryan asked if there could be TNW segments and non-TNW segments. Dave acknowledged this as a possibility. Ben asked generally about future TNW JDs (e.g., Gila River). Dave spoke to the involvement by EPA and transparency of the process on Gila. Ben expressed his concern that the Corps will make a non-TNW determination based on the distance from a (previously made?) JD. Ben asked, hypothetically, when EPA reviews a Corps decision, would EPA refute the initial determination. Dave answered yes, and Ben followed-on to ask if that would force an EPA JD (yes again). Ryan continued by asking whether there was anything that prohibited the Corps from making a non-TNW decision due to distance of a TNW segment. Staff acknowledged

that the Corps could do this. Ben asked if the Santa Cruz settlement would have been made, or more difficult, if EPA had not been involved. Staff declined to speculate, but acknowledged that such an argument was reasonable.

Ryan said that the Corps is working on guidance and asked if they are working with EPA. Dave indicated that EPA is involved, that there has been good interaction for over a year and that there are no particular concerns. Dave noted specifically that adjacency is of primary importance, of late, with the TNW issue. Ben assumed that, with Corps guidance pending, EPA has not been involved. Dave indicated that EPA is working with the Corps, including when our opinions are divided. Ben asked if the Corps would publish the guidance alone. Dave said that he could not imagine this, given EPA's role and authority in special case circumstances. Dave opined that the Corps might assert more authority of the adjacency issue (though, again, he said he could not imagine unilateral action) but he believed there is no way the Corps could act unilaterally on the TNW issue.

Ryan concluded by asking if EPA could let T&I staff know about movement between now and the final determinations. We said we would. Ben concluded by saying that he thought the September 4<sup>th</sup> meeting was designed to thwart actions/plans that the majority had begun and wanted to know the content of that meeting. Dave and Denis described the meeting, its lack of anything overt of that nature, and the focus on time line along with various TNW questions posed to the Corps.